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Phoenix, AZ 85007-2996

Subject: Docket # G-01551A-08-0383

Tony Granillo (Complainant) respectfully submits for filing an orginal and thirteen copies of Complainant's reply to answer and motion to dismiss of Southwest Gas Corporation (Southwest) filed with Arizona Corporation Commission (Commission) on August 19, 2008.

Complainant respectfully requests the Commission deny motion for dismissal of complaint pursuant to Rule 12 (b) (6) of the Arizona Rules of Civil Procedure based on precedent established in ALLIEDSIGNAL, INC, A DELAWARE CORPORATION, PLAINTIFF-APPELLANT v. CITY OF PHOENIX, DEFENDANT-APPELLEE, No. 98-15901, U.S. Court of Appeals, Ninth Circuit, argued and submitted May 13, 1999, decided June 28, 1999 (enclosed).

Respectfully submitted,

Tony Granillo
Complainant
9017 North 14th Street
Phoenix, AZ 85020
602-626-7126

Arizona Corporation Commission
DOCKETED
JAN 16 2009
DOCKETED BY

Enclosures
Reply to answer and motion to dismiss
Experian VantageScore[SM] Report
Letter of January 4, 2008 to Commission – request for informal hearing
Precedent ALLIEDSIGNAL, INC, A DELAWARE CORPORATION, PLAINTIFF-APPELLANT v. CITY OF PHOENIX, DEFENDANT-APPELLEE, No. 98-15901, U.S. Court of Appeals, Ninth Circuit, argued and submitted May 13, 1999, decided June 28, 1999

Cc: Debra S. Gallo, Dir. SWG, Government & State Regulatory Affairs
Keith A. Brown, Associate General Counsel, SWG

BEFORE THE ARIZONA CORPORATION COMMISSION

MIKE GLEASON
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
KRISTEN K. MAYES
Commissioner
GARY PIERCE
Commissioner

IN THE MATTER OF COMPLAINT FILED BY Tony Granillo, Complainant, vs. **SOUTHWEST GAS CORPORATION,** Utility	**Docket No.G-01551A-08-0383** **REPLY TO ANSWER & MOTION TO DENY DISMISSAL**

Tony Granillo (Complainant) hereby responds to the Southwest Gas Corporation (Southwest) answer and motion to dismiss pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure filed with the Arizona Corporation Commission (Commission) on August 19, 2008.

Complainant moves denial of Southwest's motion based on precedent established in ALLIEDSIGNAL, INC, A DELAWARE CORPORATION, PLAINTIFF-APPELLANT v. CITY OF PHOENIX, DEFENDANT-APPELLEE, No. 98-15901, U.S. Court of Appeals, Ninth Circuit, argued and submitted May 13, 1999, decided June 28, 1999 (Precedent). The decision states in part:

"A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is reviewed de novo. See Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998). When reviewing a dismissal for failure to state a claim pursuant to Rule 12(b)(6) all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. See Jensen v. City of Oxnard, 145 F.3d 1078, 1082 (9th Cir.), cert. denied, 119 S. Ct. 540 (1998). A complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond a doubt that the non-moving party can prove no set of facts in support of its claim which would entitle it to relief. See Steckman, 143 F.3d at 1295."

Complainant asserts as material fact that he pays his Southwest gas bill in full on a monthly basis and has never allowed his account to be delinquent, except as interpreted by Southwest billing systems and the billing systems' failure to accommodate Complainant's payment patterns.

Complainant asserts he is entitled to relief from provisions of Commission administrative rules described in Arizona Administrative Code (ACC) R14-2-303.5(B) which allow, but do not require, Southwest to establish deposits.

Complainant asserts facts in support of claim and relief as provided in letters of July 20, 2007, October 16, 2007 and November 14, 2007 included with the complaint filed with the Commission on July 21, 2008.

Accordingly, based on Precedent the Southwest motion to dismiss pursuant to Rule 12(b)(6) of the Arizona Rules of Civil

Procedure should be denied based on the two conditions established by Precedent:

1) Complainant's assertions of material fact must be taken as true and construed in the light most favorable to the Complainant.

2) Complainant has provided facts in support of claim which would entitle Complainant to relief.

RESPONSE TO ALLEGATIONS AND ASSERTIONS IN ANSWER & MOTION TO DISMISS

Complainant asserts, admits and denies as follows:

1. In paragraph 1 of its RESPONSE TO ALLEGATIONS AND ASSERTIONS IN COMPLAINT (Response) Southwest denies that it has "misapplied" ACC R14-2-303.5(B) which allows, but does not require, Southwest to establish deposits stating "the rule speaks for itself." Complainant asserts that the rule does not speak for itself. The rule purposefully uses the word "may" instead of "will" in establishing conditions under which Southwest is entitled to establish deposits (Complaint attached letter of November 14, 2007). The rule specifically says "may" and not "will" to allow discretion by utilities when applying the provisions of this rule. Complainant asserts the rule lays out the minimum conditions which trigger and allow deposits to be established and does not describe a rule requiring deposits if a credit risk does not exist. Complainant asserts he is not a credit risk as evidenced by his payment record included with Complaint and as evidenced that Southwest returned a deposit established on service initiation in December 2006 after confirmation by Seattle

City Light where Complainant was formerly a customer that Complainant is not a credit risk. Complainant asserts his credit worthiness by filing with this reply his Experian VantageScore℠ Report. The report provides Complainant with a credit score of 967 on a scale of 501 - 990, with a credit category of Super Prime, Risk Grade A and a percentile rank higher than 98.38% of U.S. customers. Complainant asserts Southwest is the only Arizona utility of which he is a customer that has applied the standard applied by Southwest when establishing deposits under ACC R14-2-303.5(B). Accordingly, Complainant asserts Southwest has misapplied ACC R14-2-303.5(B).

2. In paragraph 2 of the Response, Southwest denies Complainant's allegation that "SW Gas has refused to mediate this dispute through the informal complaint process." In a letter dated January 4, 2008 to Commission chair Mike Gleason, Complainant requested an informal hearing as established by ACC Rule 11(C)(2) - Commission Resolution of Service or Bill Disputes ("Letter" and included as a filing with this reply.) ACC Rule 11(C)(2) calls for non-binding arbitration, at the judgment of the Commission, as the final phase of the informal complaint process. Subsequent to Letter, Complainant was contacted by Commission staff, Connie Walczak, Consumer Services Supervisor, Utilities Division (Staff). Staff advised Complainant that the Commission did not consider non-binding arbitration a viable option because Southwest had advised Staff it would make no further offers in arbitration than had already been offered to Complainant. Staff recommended Complainant file a formal

complaint if he wished to continue the dispute and provided the instructions and paperwork required to do so. Accordingly, Complainant denies Southwest's assertion it agreed to mediate this dispute through the informal complaint process; i.e., conclude the informal complaint process through the final step of non-binding arbitration.

3. In paragraph 3 of the Response, Southwest denies Complainant interpretation of ACC rule R14-2-303.5(B) and asserts the rule speaks for itself. Complainant asserts the rule does not speak for itself (See also reply to Southwest paragraph 1).

4. In paragraph 4 of the Response, Southwest denies Complainant's billing and payment history establish he is not a credit risk. Southwest restates ACC R14-2-303.5(B) and states Complainant was "delinquent on four (4) instances over a twelve (12) month period." Complainant admits to being delinquent on four instances in twelve months. Complainant asserts the rule allows, but does not require, a deposit under these conditions and asserts he is not a credit risk(See also reply to Southwest paragraph 1).

5. In paragraph 5 of the Response, Southwest denies it acknowledged Complainant to not be a credit risk. Southwest asserts that when Complainant's deposit was lowered from four hundred and forty-five dollars ($455) to eighty dollars ($80) on October 15, 2007 that "Southwest reminded the Complainant that he must keep his account current to avoid future deposit billings."

Complainant admits Southwest made did not explicitly acknowledge Complainant to not be a credit risk. Complainant

asserts that by repeatedly waiving or lowering deposit requirements Southwest actions demonstrated implicit acknowledgment the Complainant was not a credit risk. Complainant denies Southwest assertion that when Complainant's deposit was lowered from four hundred and forty-five dollars ($455) to eighty dollars ($80) on October 15, 2007 that "Southwest reminded the Complainant that he must keep his account current to avoid future deposit billings." Complainant asserts he did not file a formal complaint until after Southwest demanded an additional deposit in July 2008 as evidence of assertion.

6. All allegations and assertions not specifically admitted in this Reply are hereby denied.

AFFIRMATIVE ARGUMENTS

1. Complainant has stated a claim upon which relief can be applied.

2. Complainant has provided facts in support of claim which would entitle Complainant to relief.

3. Complainant has at all times acted in good faith to resolve dispute with Southwest in accord with ACC Rule 11 Sections A - C.

4. Complainant reserves the right to assert any and all additional arguments as more information becomes known about the facts surrounding this case.

MOTION TO DENY SOUTHWEST MOTION TO DISMISS

Complainant asserts the following facts pertinent to this matter:

1. Precedent establishes two considerations upon which a motion to dismiss pursuant to Rule 12(b)(6) of the Arizona Rules

of Civil Procedure should be denied. 1) When reviewing a dismissal for failure to state a claim pursuant to Rule 12(b)(6) all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. 2) A complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond a doubt that the non-moving party can prove no set of facts in support of its claim which would entitle it to relief.

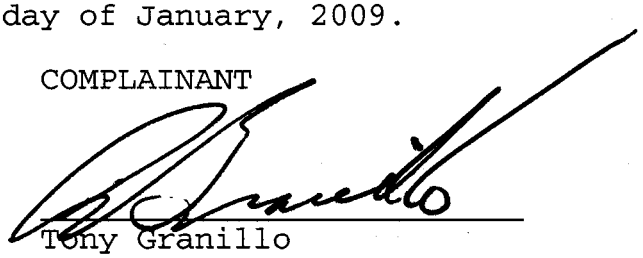
2. Complainant has made assertions of material fact.

3. Complainant has provided facts in support of claim which would entitle Complainant to relief.

Based on the foregoing and having replied to the Answer, Complainant respectfully requests the Commission grant this motion to deny the Southwest motion to dismiss the Complaint and grant relief contained therein.

RESPECTFULLY submitted this 15th day of January, 2009.

COMPLAINANT



Tony Granillo
Complainant
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Phone: 602-626-7126

IMPORTANT: Please print a copy IMMEDIATELY for future reference.
This Experian VantageScore℠ report is available to view during this session only.

Print Score Report

Experian VantageScore℠ Report

A credit score is a number that reflects your credit risk level, typically with a higher number indicating a lower risk. Your VantageScore is generated from elements on your personal credit report which are run through a scoring model that uses your past credit behavior and current credit relationships to predict likely future behavior. Your credit score changes as the elements in your personal credit report change over time.

Because your score is based on information in your personal Experian credit report, it is important that you review your personal Experian credit report for accuracy.

Prepared for: **ANTHONY R GRANILLO** Report Number: **3034930947** Report Date: **12/16/2008**

VantageScore from Experian

This VantageScore is based on information from your **Experian** credit report.
Information often differs among the three national credit bureau reports. As a result, your VantageScore based on those reports may vary.

Your VantageScore is: 967 on a scale of 501-990. **Your Risk Grade is: A**

Your Credit Category is:

High Risk | Non-Prime | Prime | Prime Plus | **Super Prime**

Percentile: Your credit rating ranks higher than 98.38% of U.S. consumers.

VantageScore Summary

About your VantageScore:

VantageScore is the credit industry's first credit score developed jointly by the three national credit bureaus. This innovative new approach to credit scoring simplifies the credit granting process for consumers and creditors by providing a consistent, objective score to the marketplace. Credit scoring is used to help potential lenders and users of credit reports quickly measure your credit worthiness and decide the type of risk they are taking by doing business with you. In addition to your credit score, lenders may also consider other factors such as your income, assets, length at current residence and employment history. There are many different scoring models used in today's marketplace and different criteria used by different lenders. Regardless of what scoring model is used, they all have one purpose: to summarize your credit worthiness.

What your VantageScore means:

Your credit score currently falls into a risk grade category of A. Factors in your credit file indicate that you may be viewed as a very low credit risk by lenders. Lenders will likely offer you the best rates and terms.

What this means to you:

Credit scoring can help you understand your overall credit rating and help companies better understand how to serve you. Overall benefits of credit scoring have included faster credit approvals, reduction in human error and bias, consistency, and better terms and rates for American consumers through reduced costs and losses for lenders.

What factors lower your VantageScore:

- The balance amount paid down across your open real estate accounts, such as a mortgage, is too low. Paying down the balances on your real estate accounts can have a positive impact on your credit score.
- Your report shows that the available credit across your open, recently reported revolving accounts, such as a credit card, is too low. Having low available credit amounts on revolving accounts has a negative impact on your credit score.
- Your report shows that the ratio of balances-to-credit-limits across your open credit accounts or loans is too high. Having a high proportion of balances to credit limits on your credit accounts or loans has a negative impact on your credit score.
- Your report shows one or more inquiries on file. Each time a potential lender pulls your credit report for review, an inquiry is placed on your file. While having inquiries on file does affect your score, the impact is minimal.

Consumer Statement:

Statement: No Statement(s) present at this time

Questions:

For general questions about your score report, please contact us toll-free at: 1 800 360 7540. For billing or technical questions, please contact us toll-free at: 1-866-369-0417. For your convenience, our billing and technical support call center is open 6:00 a.m. to 6:00 p.m. Mon-Fri and 8:00 - 5:00 Sat and Sun (Pacific Time).

DISCLAIMER

The VantageScore[SM] is not an endorsement or guarantee of your credit worthiness as seen by lenders. The different risk levels presented here are for educational use only. Your VantageScore can help you understand what factors affect your credit score and how your credit compares to that of other U.S. consumers. It does not provide advice on how to improve your credit report, credit history or credit rating.

Your credit score may be different from the score used by a lender, and it may be different from lender to lender, depending on the scoring model used. Please be aware that there are many scoring models used in the marketplace, and each lender's scoring model has its own set of factors. How each lender weighs their chosen factors may vary, but the exact formula used to calculate your score is proprietary. Generally, the higher your score, the better your chances are of obtaining favorable loan rates and terms.

Your VantageScore is calculated using your actual data from your credit file at the time that you request your VantageScore. Keep in mind that other factors, such as length of employment and annual salary, are often taken into consideration by lenders when determining whether to extend credit.

Also note that each credit reporting agency has its own unique data, which results in independent VantageScore for each of your credit files.

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182 F.3d 692 (9th Cir. 1999)

ALLIEDSIGNAL, INC., A DELAWARE CORPORATION, PLAINTIFF-APPELLANT, v. CITY OF PHOENIX, DEFENDANT-APPELLEE.

No. 98-15901

U.S. Court of Appeals, Ninth Circuit

Argued and Submitted May 13, 1999
Decided June 28, 1999

Thomas L. Hudson and David B. Rosenbaum, Osborn Maledon, Phoenix, Arizona, for the plaintiff-appellant.

Peter S. Modlin, Landels Ripley & Diamond, San Francisco, California; Phillip M. Haggerty, Chief Assistant City Attorney, Phoenix, Arizona, for the defendant-appellee.

Appeal from the United States District Court for the District of Arizona Paul G. Rosenblatt, District Judge, Presiding D.C. No. CV 96-00683-PGR

Before: Warren J. Ferguson and Sidney R. Thomas, Circuit Judges, and Garr M. King, District Judge.[1]

OPINION

KING, District Judge

I. OVERVIEW

AlliedSignal, Inc. ("AlliedSignal") appeals from the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) of its action seeking money damages and equitable relief against the City of Phoenix ("City") for damage to AlliedSignal's water sprinkler systems ("systems"). AlliedSignal contends that the district court erred by (1) concluding that the City was entitled to absolute immunity against its claims for money damages, and (2) concluding that mandamus relief was unavailable in light of the City's discretion in implementing its water disinfection policy. We have jurisdiction under 28 U.S.C. S 1291, and we reverse in part and affirm in part.

II. BACKGROUND

AlliedSignal, a Delaware corporation, owns various parcels of real property within the City of Phoenix, each containing a fire protection sprinkler system. AlliedSignal gets the water necessary to operate its systems from the City's public water supply system. Because the water comes from the same distribution system used for providing drinking water to the City's residents, the water is treated by the City pursuant to its water disinfection policy to make it potable. In 1995, AlliedSignal discovered that the pipes in its systems were corroding at an unusually rapid rate. AlliedSignal determined that corrosioninducing bacteria ("CIB") in the water supplied by the City was causing the corrosion.

AlliedSignal filed an administrative claim against the City. The City refused to accept the claim and AlliedSignal brought this diversity action alleging that the water provided by the

City contains excessive amounts of bacteria. AlliedSignal asserted claims for negligence, breach of the implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, strict liability for defective product, and failure to warn. In its complaint, AlliedSignal sought damages for the cost of replacing the corroded pipes and a permanent injunction and/or a writ of mandamus requiring the City to take all necessary measures to ensure that the water it provides is free of CIB.

The City filed a motion to dismiss pursuant to Rule 12(b)(6), contending that AlliedSignal's claims were barred by Arizona's Actions Against Public Entities or Public Employees Act ("Immunity Act"), Ariz. Rev. Stat. S 12-820 et seq. The district court granted the motion, concluding that the City was absolutely immune under the Immunity Act from AlliedSignal's challenge to the City's formulation of a water disinfection policy. The district court also rejected AlliedSignal's request for a writ of mandamus requiring the City to pretreat its water so that it is free of CIB, concluding that "mandamus may not be used to instruct a public official how to exercise discretion." This appeal followed.

III. ANALYSIS

A.

It is well-settled law in Arizona that governmental immunity is the exception and liability is the rule. See City of Tucson v. Fahringer, 795 P.2d 819, 820 (Ariz. 1990). Under S 12-820.01 of the Immunity Act, "public entities are protected by absolute immunity when the process involves legislative or judicial decision making within the respective powers granted to the legislature or judiciary, but entities are entitled to immunity for administrative action only to the extent such action involves the determination of fundamental governmental policy." Fidelity Sec. Life Ins. Co. v. Arizona Dep't of Ins., 954 P.2d 580, 583 (Ariz. 1998).

It is undisputed that the City's delivery of water is an administrative action and thus will only give rise to immunity to the extent that it involves the determination of fundamental governmental policy. In granting the City's Rule 12(b)(6) motion, the district court concluded that AlliedSignal's complaint challenged the City's formulation of its water disinfection policy that the court found to be "the quintessential exercise of governmental discretion in an area of fundamental government policy." See Galati v. Lake Havasu City, 920 P.2d 11, 15 (Ariz. Ct. App. 1996) (absolute immunity applies to discretionary governmental actions involving fundamental governmental policy). AlliedSignal contends that dismissal of its complaint at the pleading state was inappropriate because the district court misread the complaint as challenging the City's formulation of its water disinfection policy. As AlliedSignal points out, the complaint doesn't mention the water disinfection policy. Rather, it merely states that the City was negligent in delivering contaminated water to its facilities. The complaint offers no theories as to how this water became contaminated. The question thus becomes whether the district court's dismissal of AlliedSignal's complaint based on its Conclusion that the City was entitled to immunity from AlliedSignal's negligence claim seeking money damages was appropriate under Rule 12(b)(6).

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is reviewed de novo. [redacted] 145 F.3d 1078, 1082 (9th Cir.), cert. denied, 119 S. Ct. 398 (1998). [redacted] unless it appears beyond a doubt [redacted] plaintiff can prove no set of facts in support of its claim which would entitle it to relief. See Steckman, 143 F.3d at 1295.

As previously stated, not all administrative decisions made by a public entity in Arizona are entitled to immunity. To be entitled to immunity for its administrative actions, a public entity must demonstrate that the action involves the determination of a fundamental governmental policy. See Warrington v. Tempe Elementary Sch. Dist. No. 3, 928 P.2d 673, 676 (Ariz. Ct. App. 1996). The burden of showing that its administrative action falls within this narrow category of fundamental governmental policy making rests with the public entity. See Fidelity, 954 P.2d at 583.

In Fidelity, the Arizona Supreme Court reversed the court of appeals' affirmance, in a consolidated appeal, of the Maricopa County Superior Court's dismissal of three separate complaints under Arizona Rule of Civil Procedure 12(b)(6).[2] See id. at 581-82. In each case, the plaintiffs' complaints alleged that the defendant public entities were negligent in carrying out their administrative duties. The trial courts concluded that dismissal at the pleading stage was appropriate because the defendant public entities were entitled to absolute immunity under the Immunity Act for their discretionary actions involving fundamental governmental policy. See id. at 582. In reversing, the Arizona Supreme Court held that the trial courts acted prematurely by granting Rule 12(b)(6) motions in the "face of the allegations in these complaints." Id. at 583. The Court held that "[o]n the face of the pleadings" it was not apparent that the public entities were acting in an area of fundamental governmental policy. Id. at 584. Thus, because the public entity has the burden of "plead[ing] and prov[ing]" that their actions fall within the "narrow category of fundamental governmental policy making," and the four corners of the plaintiffs' complaints did not evince such action, the trial courts erred by granting defendants' motions to dismiss. Id. at 583-84.

The district court in the case before us made a similar error. Fairly read, the four corners of AlliedSignal's complaint alleges that it purchased water from the City and the water contained excessive amounts of bacteria that damaged its systems. Nowhere in the complaint does AlliedSignal allege that the City's formulation of its water disinfection policy was the cause of the excessive bacteria in the water. As AlliedSignal points out, there are numerous potential explanations for the presence of excessive bacteria in the water; only one (the City's formulation of its water disinfection policy) that would arguably entitle the City to immunity from AlliedSignal's claim for money damages. For example, a mistake made by a City employee charged with the ministerial task of implementing the water disinfection policy may have caused the heightened level of bacteria and the resultant harm to AlliedSignal's systems. Under Arizona law, the City most likely would not be entitled to immunity under the Immunity Act for this hypothetical act of negligence. See Evenstad v. State, 875 P.2d 811, 816-17 (Ariz. Ct. App. 1993) (distinguishing betweendiscretionary governmental actions involving fundamental governmental policy, to which immunity applies, and ministerial actions implementing that policy, to which immunity does not apply); Ryan v. State, 656 P.2d 597, 598 (Ariz. 1982) ("[W]here negligence is the proximate cause of injury, the rule is liability and immunity is the exception.") (quoting Stone v. Arizona Highway Comm'n, 381 P.2d 107, 112 (Ariz. 1963); Diaz v. Magma Copper Co., 950 P.2d 1165, 1175 (Ariz. Ct. App. 1997) (state inspector's negligent implementation of governmental policy not entitled to absolute immunity); Schabel v. Deer Valley Unified Sch. Dist. No. 97, 920 P.2d 41, 46 (Ariz. Ct. App. 1996) (policy level decision to install a playground is entitled to immunity but negligent implementation of that policy is not); Warrington, 928 P.2d at 676 (school district's placement of bus stop is operational decision not entitled to absolute immunity under the Immunity Act).

We do not, of course, mean to imply that the City or one of its employees was guilty of this or any other negligent act in implementing its water disinfection policy. Our intent is merely to illustrate that, on its face, AlliedSignal's complaint suggests the existence of negligence by

the City in delivering the tainted water and, given the narrow scope of governmental immunity in Arizona, if AlliedSignal can produce evidence showing such negligence it may be able to prevail on its claims.[3] See Steckman, 143 F.3d at 1295 (a claim should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that a plaintiff can prove no set of facts in support of its claim that would entitle it to relief). Here, examining the face of AlliedSignal's complaint, we cannot say that it is "beyond doubt" that AlliedSignal will be unable to prove the facts necessary to entitle it to relief.

Moreover, Federal Rule of Civil Procedure 8(a)(2) requires only notice pleading--"a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). AlliedSignal contends that the damage to their systems was caused as a direct result of the City's negligence in delivering water containing excessive amounts of bacteria. We are not persuaded by the City's argument that, even if immunity does not apply here, the dismissal was nevertheless appropriate because AlliedSignal failed to plead specific facts in its complaint concerning the nature of the City's alleged negligence. Rule 8(a)(2)'s liberal pleading standard only requires that "the averments of the complaint sufficiently establish a basis for judgment against the defendant." See Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1481 (9th Cir. 1997).

Further, we are required to take all allegations of material fact in the complaint as true and construe them in the light most favorable to AlliedSignal. See Jensen, 145 F.3d at 1082. While AlliedSignal may not ultimately prevail, we cannot say that AlliedSignal's complaint fails to state a claim that would entitle it to relief under Arizona law. See, e.g., Galati, 920 P.2d at 15 (governmental immunity does not apply to plaintiff's negligence claims). The complaint tells the City that its allegedly negligent conduct caused the damage to AlliedSignal's systems, providing notice of the claim the City would need to defend against. See Yamaguchi, 109 F.3d at 1481 ("[A]ll the Rules require is `a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.") (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). We conclude that the district court erred in dismissing AlliedSignal's claim for damages. Thus, we reverse the district court's dismissal of AlliedSignal's claim for damages and remand this case to the district court for further proceedings.

B.

AlliedSignal also argues that the district court erred by dismissing its claim for injunctive relief. We disagree. As AlliedSignal concedes, the district court recognized that AlliedSignal's requested equitable relief could not be barred by the Immunity Act when it stated that "the statute immunizes a public entity only from money damages and not from equitable relief." See Zeigler v. Kirschner, 781 P.2d 54, 61 (Ariz. Ct. App. 1989) (concluding that Immunity Act does not bar claims for equitable relief).

The district court concluded, however, that AlliedSignal's request for a "mandatory injunction and/or writ of mandamus" requiring the city to pre-treat its water so that it is free of CIB was governed by mandamus considerations. See Oregon Natural Resources Council v. Harrell, 52 F.3d 1499, 1508 (9th Cir. 1995) ("When the effect of a mandatory injunction is the equivalent of mandamus, it is governed by the same standard."). The district court properly concluded that AlliedSignal's request for mandamus relief must fail because "mandamus may not be used to instruct a public official how to exercise discretion." See Sears v. Hull, 961 P.2d 1013, 1016 (Ariz. 1998) ("[T]he general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus.") (internal quotation omitted); Kahn v. Thompson, 916 P.2d 1124, 1127 (Ariz. Ct. App. 1996) ("Mandamus may compel the performance of a ministerial duty or compel the officer to act in a matter involving discretion,

but it may not designate how that discretion shall be exercised."); Barron v. Reich, 13 F.3d 1370, 1376 (9th Cir. 1994) ("[M]andamus may not be used to impinge upon an official's legitimate use of discretion.").

Mandamus relief may be available, however, where a public official has violated statutory or regulatory standards delimiting the scope or manner in which official discretion can be exercised. See Barron, 13 F.3d at 1376. Here, as the district court recognized, AlliedSignal has not properly alleged that the City has violated any statutory or regulatory standards in the formulation and implementation of its water disinfection policy.[4] Thus, we conclude that the district court properly dismissed AlliedSignal's request for a writ of mandamus.

IV. CONCLUSION

For the reasons stated herein we affirm in part, reverse in part, and remand for further proceedings. Each side will bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

NOTES:

1 The Honorable Garr M. King, United States District Judge for the District of Oregon, sitting by designation.

2 Arizona Rule of Civil Procedure 12(b)(6) is identical to Federal Rule of Civil Procedure 12(b)(6).

3 It may well be that, as the City argues, the existence of bacteria in the water it delivered to AlliedSignal is an unavoidable result of the City's discretionary act of formulating a water disinfection policy that complies with federal law and that AlliedSignal will be unable to prove any other cause for the bacteria. Unlikelihood of success, however, does not, by itself, justify dismissal under Rule 12(b)(6). See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.").

4 AlliedSignal's complaint states that "further investigation may show that Phoenix has also violated provisions of the federal Safe Drinking Water Act." AlliedSignal conceded, however, at oral argument before the district court and this court that it is not bringing a claim under the federal Safe Drinking Water Act.

1 FERGUSON, Circuit Judge, Concurring in part and Dissenting in part:

2 I concur in the part of the majority opinion which holds that the plaintiff does not have a claim for injunctive relief. I Dissent from that part of the opinion which declares that the plaintiff may have a cause of action for monetary damages. The pleadings are insufficient to raise a claim of negligence. Moreover, the district court had it right--the city is immune from tort liability for delivering safe drinking water to the public.

I.

3 It is true that Fed. R. Civ. P. 8(a)(2) requires only a short and plain statement of the relevant facts. Nonetheless, the plaintiff must set forth the theory of the case "with enough detail to guide discovery." McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996). In McHenry, the court cited with approval a standard negligence complaint that attempted to

offer at least a bare statement describing how the defendant struck and injured the plaintiff. Id. Here, AlliedSignal offers not even one fact to allege how the City of Phoenix breached its duty to provide "non-defective" water. AlliedSignal merely alleges that its water contained corrosion-inducing bacteria, that the water caused injury to its pipes, and that the city owed various duties of care to the company that were breached by the presence of the bacteria. But the mere presence of bacteria in its water does not establish a breach. Nowhere does AlliedSignal provide even a bare allegation that the bacteria in the water supply had no business being there, thus violating the city's duty of care.

4 Ample case law supports the proposition that more than conclusory allegations are needed to give the defendant the requisite notice of the plaintiff's claim under Rule 8(a)(2). See Hatch v. Reliance Ins. Co., 758 F.2d 409, 415 (9th Cir. 1985) (upholding district court's determination that a conclusory complaint did not comply with Rule 8). See also Kyle v. Morton High School, 144 F.3d 448, 455 (7th Cir. 1998) (sufficient facts must be alleged to allow the court and defendants to understand the gravamen of the plaintiff's complaint); Maljack Productions, Inc. v. Motion Picture Ass'n of America, Inc., 52 F.3d 373, 375 (D.C. Cir. 1995) (inferences cannot be accepted if they are unsupported by the alleged facts, nor can the court accept purely legal Conclusions masquerading as factual allegations); Fleming v. Lind-Waldock & Co., 922 F.2d 20, 23 (1st Cir. 1990) (each general allegation must be supported by a specific factual basis and pleadings are not sufficient where they rest on unsubstantiated Conclusions). AlliedSignal has not identified any specific conduct that would subject the City of Phoenix to liability.

II.

5 More importantly, as even the majority opinion concedes, the water AlliedSignal complains about "comes from the same water distribution system that provides drinking water to the City's residents." Slip Op. at 694. AlliedSignal's lawsuit does nothing more than challenge the city's delivery of this water, which the company has not alleged violates any federal safe drinking water standards. The City of Phoenix, in order to make the water it delivers fit and pure for human consumption, treats its water pursuant to a water disinfection policy. However, the plaintiff, a commercial user, claims that the water which is treated for human consumption is destroying its pipes. That is all that the complaint alleges, and it is simply silly.

6 It is this kind of case which fosters the clamor for tort reform. The State of Arizona already has acted. Under Arizona law, a city within the state which exercises "an administrative function involving the determination of fundamental governmental policy" is absolutely immune from liability. A.R.S. S 12-820.01 (A)(2). A city's decision regarding how to treat water for safe human consumption is a quintessential exercise of fundamental policymaking in which public entities engage. See Fidelity Sec. Life Ins. v. Arizona Dep't of Ins., 954 P.2d 580, 583 (Ariz. 1998) (if the element of fundamental governmental policy is present in the decision making process, then the exercise of discretion is presumed). The plaintiff, therefore, cannot make the city pay for the alleged damageto its water pipes merely from drinking water that the city has determined must contain some bacteria in order to be safe for human consumption.

7 Even if Arizona had not adopted its immunity rule, Phoenix would not be liable under the common law. In 1928, Justice Cardoza, then writing for the New York Court of Appeals, adopted a sensible tort reform rule. Simply stated, the rule is that in tort law there is no liability if the damage was not foreseeable. Palsgraf v. Long Island R.Co., 162 N.E. 99 (N.Y. 1928).

8 Our Supreme Court has adopted a similar principle in cases involving qualified immunity for public officials alleged to have acted under color of law in Section 1983 actions. They are not liable unless their conduct clearly was prohibited at the time of the alleged injury, and a reasonable person would have known of this prohibition. Wilson v. Layne, 119 S.Ct. 1692, 1696 (1999). In this case, there is not even a hint anyplace that treating water for human

consumption creates an action for damages when the water which is beneficial to humans is destroying the pipes that carry it.

9 Judge Rosenblatt was correct in dismissing this frivolous litigation. I respectfully Dissent.

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